IN THE

Supreme Court of the United States

VALENTINE BROADWAY BOWERS, JR.
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT

TO THE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Statement of Matter Involved.

For the purpose of brevity and to avoid repetition we adopt as our "statement of matter involved" and quote pertinent parts of the opinion of the Court of Appeals of the Fifth Circuit which affirmed the judgment of conviction, which was rendered in the District Court of the Southern District of Florida on February 4, 1949, R.P.P. 14 et. seq. We shall place in quotes the matter referred to in the Court's opinion, not reported, but is in the record R.P.P. 235 et seq.

"The jury found the appellant guilty as charged on counts four, five, and seven, of an indictment for using the mails to defraud, but disagreed as to his guilt on all other counts, namely, one, two, three, and six. The Court below set aside the verdict as to the seventh count, because the prosecution was barred by the three-years statute of limitation, and pronounced sentence only upon counts four and five, providing that the term on each count should run concurrently.

And the Court continued:

"The verdict of the jury, which is amply supported by the evidence, establishes that the appellant devised and intended to devise a scheme and artifice to defraud at least two persons, designated as victims; and, for the purpose of executing said scheme, deposited certain letters in an authorized depository for mail matter to be sent to said victims by the United States Post Office Department. A part of the scheme was to cause advertisements to be placed in several leading newspapers, advertising his business and soliciting persons to become his partner. As a result of said advertisements, the appellant would enter into correspondence with various parties whom he intended to make victims of his scheme.

And the Court continued:

"It was further a part of said scheme and artifice that appellant would represent (and he subsequently did represent) to said victims that he was the owner of an automobile business and president of automobile corporations located at Fort Lauderdale, Florida, and was the

owner of a taxicab business and properties in Pompano, Florida; that he desired and was willing to establish a partnership to operate said businesses, which were active and prosperous; that he was in a position to sell and would sell to said victims an undivided one-half interest in the same and other designated property; that he would offer and did offer to convey to said victims an undivided one-half interest in all of said property and businesses, allowing the victims to work such hours as necessary for the good management thereof, and to assist him in all matters pertaining thereto, for which they would receive a weekly salary.

And the Court continued:

"A further part of the scheme was that he would represent to said victims that, if for any reason they should become unable to perform the services required of them by their contracts, their investments would be returned to them within a reasonable time; that these representations were well known by the appellant to be false, and were devised to and did deceive and defraud said victims. The scheme was to negotiate simultaneously with as many of the victims as might respond to his advertisements, and to enter into contracts consecutively with as many of them as he could induce to accept his proposals. The scheme was formed and carried out through the use of the United States mails. The appellant entered into said contracts consecutively; and thus, while the earlier contracts were still in force, he purported to convey an undivided one-half interest in the businesses to other parties, retaining one-half for himself in each instance.

And the Court concluded:

"One of the few exceptions to the court's charge was as to the effect that the jury should give any refunds to the victims of money wrongfully obtained from them. The Court correctly charged the jury that such refunds were not a defense if the defendant was guilty of devising a fraudulent scheme to defraud them and others and of using the mail in furtherance of said scheme. . . "

The balance of the Court's opinion is omitted.

The fourth count of the indictment under which Petitioner was found guilty referred to the alleged victim J. S. MacLaren of Euclid, Ohio. The fifth count of the indictment under which Petitioner was convicted referred to the alleged victim Darwin S. York of Warren, Ohio.

The questions presented herein relate to the giving of an argumentative and *one-sided* charge to the jury after they had retired to consider their verdict and had twice returned to the Court that they could not agree on any of the counts.

The testimony of MacLaren and York will be referred to to show the bona fide defense offered by Petitioner and why the jury had great difficulty in arriving at a verdict, on any count, which verdict Petitioner contends would not have been arrived at unless the Court had given the argumentative, one-sided and erroneous charge on a vital phase of the case which affected the substantial rights of the Petitioner.

J. S. MacLaren testified (R.P. 91) that he answered an advertisement in the Cleveland Plain Dealer of the Petitioner and corresponded through the mails relating to negotiations thereafter ensuing. Petitioner under the name of Coastal Motors, Inc., addressed a letter to the complaining witness that he wanted a man who could meet the public and take care of three businesses in Ft. Lauderdale, Florida, which were established, and that, as stated in the advertisement, such person would have to guarantee the Petitioner against loss; that the position to the right man would pay $75.00 a week, plus part of the net income. Thereupon, Bowers and the complaining witness met in Jacksonville, Florida, at the George Washington Hotel, where Bowers orally explained he owned two service stations in Ft. Lauderdale and also operated from either one or both of these service stations a used car business and rental car business, and also was going to have a taxi business operating from there. He said he wanted a man who could work in all phases of all of these businesses and act as manager and work with them, because he was going to take over the Buick Agency which his mother had, and therefore would need a man to take over the other businesses and run them. It was put up to MacLaren that Bowers wanted to protect himself against loss by having MacLaren put up $5000.00 in escrow, and if everything worked out satisfactorily that would be given back to MacLaren. (R.P. 93.) Thereafter, MacLaren came down to Ft. Lauderdale with his wife, and Bowers pointed out the filling station and they went by the Buick garage, and then drove to the Island Motors. It was a used car lot, and "... he told me he would not tell me much about that, but it would soon be his." They thereupon went to a second service station, according to MacLaren, where they stayed

only a few minutes. Bowers thereupon said, "You have seen everything. I want a man and you look like the man. Why don't you go back North and think it over and if you want to come in with me, 'phone me from Daytona Beach and let me know." (R. P. 95.) That night MacLaren called from Daytona and told Bowers that he liked the set-up and thereupon Bowers told MacLaren to send a check immediately for a thousand dollars. However, MacLaren stated that he would wait until he got back to Cleveland. MacLaren mailed the contract with his signature on it with his check for $1,000.00, and sent a letter with it, and told Bowers he was sending the check and the contract, and would he sign it and send it back to MacLaren. The check bore the statement, "Initial payment on total of $3,000.00, as per terms of contract. To be refunded if contract not agreeable to V. B. Bowers, Jr., and J. S. MacLaren." (R. P. 97.) The period of refund was changed from 30 to 60 days, and Bowers agreed to pay the sum of $75.00 per week, the contract to run for a period of one year with the mutual understanding that MacLaren shall have the opportunity to purchase one-half undivided interest in such business at the retail market price at that time. MacLaren stated that he finally got a letter from Bowers, but did not get a copy of the contract, and that Bowers requested that the contract be drafted on legal size stationery, and requested MacLaren to make up the contract, as Bowers did not have time to prepare the papers himself. MacLaren thereupon had the contract drawn and mailed back to him on or about May 23, 1946, two days after he had received instructions from Bowers. Thereupon Bowers later advised MacLaren, by letter, that he was bringing some new cars North, and that he was thinking seriously of taking over the used car lot, and that he

was bringing the contract with him and wished to discuss some other matters with MacLaren. MacLaren testified (R.P. 101) Bowers never came up North, and that Bowers waited for another week or so. In the meantime MacLaren had given up his apartment, left his job, moved in with his folks, sold all of his furniture, and was quite desperate about it. (R.P. 102.) Thereupon, MacLaren sent Bowers another letter, complaining of the fact that the contract was no longer in effect, since Bowers changed the business from what it was when MacLaren sent him his check for $1,000.00, and further that the nullification of the original contract cost MacLaren considerable inconvenience and financial loss, and that he had given up his apartment. MacLaren thereupon proposed to Bowers by letter that the original agreement be cancelled and that MacLaren would work for Bowers as a Manager on a salary, plus commission, without putting up $3,000.00.

Bowers thereupon telephoned MacLaren and asked him to come to Ft. Lauderdale. When MacLaren arrived he testified (R.P. 105) that Bowers had changed things around. The original agreement was that there were two service stations, and when MacLaren got there he found there were no longer the service stations, there was just a used car lot with two cars on it. That Bowers also advised him he had motor scooters there and was the sole distributing agent for them, and that was part of Coastal Motors. Bowers shortly told MacLaren to go out on the road and do some buying for the used car end of it. MacLaren went to West Palm Beach and various places for several days, and called Bowers up from these places, and Bowers discouraged him and told him to come back and talk it over with him. Bowers thereupon asked him for

the other $2,000.00 in order to make MacLaren a partner (R.P. 105.) MacLaren thereupon met Mr. York, who had also answered an ad in the Cleveland Plain Dealer and found out that they had similar contracts offering both one-half interest in the business and that they had been at the George Washington Hotel in Jacksonville on the same day. When they found out they were both in a position where "We each had 50 percent of the same business in the same contract," (R.P. 106), it called for a showdown which was had the next morning, and MacLaren told Bowers he wanted his thousand dollars back, and Bowers thereupon refunded $1,000.00 back to MacLaren (R.P. 107) according to MacLaren's own testimony. On cross examination MacLaren stated that Bowers did not refuse to sign the contract which was prepared in Cleveland by MacLaren, and that Bowers actually signed a copy of it (R.P. 110). It appears that thereafter he and Bowers could not agree to certain changes in the contract for additional types of businesses (R.P. 111) and witness admitted that Bowers did sign a contract with him again in his testimony (R.P. 112) which was done at the office of Bowers and prepared on Bowers' typewriter and signed in the presence of Mr. MacLaren. A check for $75.00 was also paid by Bowers to MacLaren, dated August 24, which was cashed by the complaining witness and marked for identification Defense Exhibit No. 13 (R.P. 113). The check represented a week's work on a $75.00 a week basis (R.P. 114). The complaining witness further testified that he told Bowers that he was not interested any further, except as a $75.00 a week man with a commission on what he sold, and that he did sign a contract with Bowers and the thousand dollars was returned to him. MacLaren testified: "Q. And you have received back all the money you

have given Mr. Bowers? A. Other than my personal losses from selling my furniture and giving up my job. Q. You did not give that to Mr. Bowers, did you? A. Indirectly, yes." (R.P. 117.)

The testimony of York will be brief, as the testimony of MacLaren sets out the background of the business ventures involved. York testified he was an accountant residing in Cleveland, Ohio, and in negotiating with Mr. Bowers had made several trips back and forth between Cleveland, Ohio, and Jacksonville, Florida, and Ft. Lauderdale, Florida.

York put up $5500.00 (R.P. 137) with Bowers for a 50 percent interest in a corporation to be formed under the name of Island Motors Corporation. (R.P. 141.) It appears that the original contract between Bowers and York related to two filling stations, but before the full $5500.00 was paid, Bowers had told York he was no longer operating such filling stations. (R.P. 147.) Bowers executed a check to W. G. Ford for $5500.00 on July 22, 1946 (R.P. 242), to purchase the physical assets and lease held by Island Motors which was to be turned into the new corporation, including certain physical assets as shown on R.P. 245. York further authorized Bowers to find him a house in which he and his wife could live at Ft. Lauderdale, and it appears Bowers used some of the money for the rental of such a house, the amount of the sum being not fully determined. Thereafter York became dissatisfied, requested the return of his money, and accepted a non-negotiable promissory note from Bowers in the sum of $5000.00, on which he sued Bowers to reduce the same to judgment. York testified that he had incurred many expenses in traveling to and from Cleve-

land, Ohio, and the State of Florida on numerous trips, including the rental of the house in Ft. Lauderdale.

This in substance is the relevant testimony to which the subsequent charge complained of applies.

After the Court had charged the jury and the jury retired to consider its verdict, the jury returned and informed the Court that it had not been able to reach a verdict, and that was true as to each count of the indictment (R.P. 307). The Court thereupon asked the jury: "Is there anything about the law of the case that I could offer an explanation about, sir? Foreman of The Jury: Evidently not, sir. The Court: Have any of you gentlemen any questions about the law or any thing else about the case which you would like to ask, about which I might be of any assistance to you? (No response.)" The Court thereupon charged the jury to endeavor to come to a verdict, and asked them to consider the case a while longer. Thereupon the Court recessed, and again thereafter the jury returned to the courtroom and a discussion was had between the jurors and the Court as to the definition of a contract. Thereupon the Court said, "What else, gentlemen? (No response.)" (R.P. 312.) The Court thereupon, of its own volition, subsequently charged the jury as follows:

The Subsequent Charge

"The Court:

"Gentlemen, it seems to me that a further considera-

tion of this evidence should enable you to reach an agreement on at least some of these counts, if not all of them. The issue is pretty narrow here. As I undertook to tell you when you went out the first time, there is no real controversy about the use of the mails. The Government has proven that, and there is no denial. That leaves only the question before you of whether or not this was a fraudulent scheme, the transactions of this Defendant with the witnesses whom you have heard.

"The Defendant in his own behalf has testified to you that these were legitimate transactions and legitimately entered into, open and above board. If you believe that, you should acquit him. If that testimony leaves a reasonable doubt in your mind, you should acquit him.

"But you should carefully consider all the other facts and circumstances in the case as against that testimony of the defendant. It appears that in the course of about two years, from 1944 until 1946, roughly, that this Defendant took in as partners or associates, or whatever you might call them, Kimbrough, Dispennetti, Robinson, MacLaren, York and Nicholls, who are named in the indictment. These six people, and in addition, Clark, the gentlemen who testified this morning, Dr. Roddy and the witness, Laki. It appears from the evidence without contradiction, that all of them put up money. Some of them got some part of it back, or some of them got back their entire cash investment. Some of them have gotten nothing. The Defendant obtained from them anywhere from $500.00 to $1000.00. Mr. York testified he actually put up $5800.00, of which he has gotten nothing back. I think a few hundred dollars went for his rent — maybe $300.00. You should

consider that nearly all of these transactions followed the same pattern, and that, so far as I can recall, none of these Defendants got anything back in the way of any profit. I don't recall anybody who did, and I hardly think the evidence would justify you to believe that any of these men have been made whole, if you count their time and expenses and quitting their jobs, and selling their homes and moving down here.

"You should consider those things, and you have every right to consider, also, as bearing on this man's motives and his credibility, the fact that he was convicted of violations of this statute in 1938. Don't understand me to mean that a man that is once convicted is forever damned, but you have every right to consider that, not as prejudicing you against him, but as a bearing on his motives—what his motives and intentions were in these transactions.

"You have asked me a lot of questions about a contract, and frankly I don't see that any legal questions about a contract have any great bearing in this case. A question of not whether or not the man entered into a legal contract—it may be that it was a legal contract; maybe it was dated as of a certain date—the question is, his motive. Whether he was honest or not; whether his representations to these people were honest. And if they were, even if they were rosy, that is one thing, and it is quite another thing if it was his purpose to defraud these people, and that is the real question before you.

"One of the Jurors:

"How many counts does he have to convict him on? Is there any certain amount, or anything like that?

"The Court:

"On, no. There are seven counts in the indictment. Each one is separate.

"One of the Jurors:

"Would you figure maybe he was guilty on two—that would be sufficient?

"The Court:

"What would be preferable, if you came to some agreement on all counts — either guilty or not guilty. But it is entirely in your province to convict him on all counts or acquit him on all of them, or convict him on some and acquit him on some. If you think the evidence of payment satisfies you that there was no defraud intended, then you may acquit him on that count. Although, as I have told you, the fact that compensation was paid back, that does not necessarily mean that he was not guilty of fraud in the first instance. But that is for you, whether you acquit or convict. But you may very well, according to the way you view the evidence, you may acquit on one or more counts and you can convict on some of the others. Although I hope you won't do it. I would much prefer you would agree on them all one way or the other. But it is entirely within your province to find a verdict on one or more counts and disagree on one or more. But I would much prefer for you to agree on all of them.

"All right, you may retire, gentlemen.

"(Jury retires.)

"The Court:

"Exceptions from the Government?

"Mr. Duhaime:

"No, sir.

* * * * *

"Mr. Kehoe:

"I think, if the court please, I will except to that part of the Court's charge to them that they should take into consideration any loss that these people may have suffered. I don't think that is a proper element of the offense in this case here, and second, as to the instruction as to the testimony of the witnesses, Laki and Clark, and in reference to Dr. Roddy, as the Government announced they did not intend that to be taken as evidence as a part of this case, but purely evidence to show the intent the Government claims this man had. And the charge that they should take into consideration, the guilt or innocence of the accused in this charge.

The Trial Court overruled the exception of counsel for Petitioner. A motion for a new trial was duly filed and denied (R.P. 11).

The sole assignment of error before the Court of Appeals was based upon the premise that the subsequent charge of the Court was argumentative and too strenuously impressed upon the jury circumstances tending to show a guilty intent to defraud by the accused, with no mention of specific points and evidence insisted upon by the Petitioner as to his good faith in the course of his transactions with the complaining witnesses.

The Court of Appeals *did not consider petitioner's assignment of error* as to the charge being argumentative and one-sided. The Court of Appeals for the Fifth Circuit considered the subsequent charge of the Trial Court only on the specific exception taken as to the effect that the jury should give to any refunds to the victims of the money wrongfully obtained from them. The Court of Appeals thereupon held the Trial Court correctly charged the jury that such refunds were not a defense if the Petitioner was guilty of devising a fraudulent scheme to defraud them and of using the mail in futherance of said scheme.

Jurisdictional Statement

The statutory provisions believed to sustain the jurisdiction of this Court are Section 240 of the Judicial Code (Section 347, Title 28, U. S. Code), and (Act of June 7, 1934, Ch. 426, 48 Stat. 926).

Date of Judgment Sought To Be Reviewed.

The United States Court of Appeals of the Fifth Circuit, on November 16, 1949, entered its judgment of affirmance of the judgment of the United States District Court for the Southern District of Florida, entered February 4, 1949 (R.P.P. 14, 15).

Questions Presented

(a) The Court of Appeals and this Court, are not precluded from entertaining the objection contained in an assignment of error to an erroneous charge, where said charge was not properly excepted to, and such charge was

on a vital phase of the case and affected the substantial rights of the Petitioner, after the jury had retired to consider its verdict and had twice announced they could not agree on any count of the indictment.

(b) When there is sufficient evidence upon a given point to go to a jury, and where the jury had retired to consider its verdict, and after the jury twice announced they could not agree on any count of the indictment, the Trial Court, feeling duty to review facts for purposes of aiding jury in correct understanding, must do so in fairness to both litigants, and may not give an argumentative and one-sided subsequent charge.

Reasons For Allowance Of The Writ

The Court of Appeals in this instance in declining to rule on the assignment of error based on an argumentative and erroneous charge because of the absence of a specific exception thereto has decided a Federal question in a way, probably, in conflict with Rules 52 Sub-Section (b) of the Federal Rules of Criminal Procedure, and also in conflict with applicable decisions of the Court, especially and definitely with United Brotherhood vs. United States 330 U. S. 395, 91 Law Edition 973, and in conflict with other decisions of this Court.

Prayer

WHEREFORE, your Petitioner VALENTINE BROADWAY BOWERS, JR., respectfully prays that a Writ of Certiorari may be issued out of and under the Seal of this Court, directed to the United States Court of

Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of record of all proceedings of the said Court of Appeals in said case therein entitled VALENTINE BROADWAY BOWERS, JR., Appellant, vs. UNITED STATES of AMERICA, Appellee, No. 12682, to the end that the said case may be reviewed and determined by this Court, and that your Petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate, and that the said judgment of said Court of Appeals may be reversed by this Honorable Court.

AND your Petitioner will ever pray.

BART. A. RILEY

Counsel for Petitioner.

STATE OF FLORIDA }
COUNTY OF DADE } ss:

BART. A. RILEY, being first duly sworn, deposes and says that he is counsel for Petitioner named in the foregoing Petition; that he prepared the same, and that the matters and things therein set forth are true as he verily believes.

BART. A. RILEY

Sworn to and Subscribed before me this 8th day of December, A. D., 1949.

M. ESSEX

Notary Public
State of Florida at Large.
My commission expires April 25, 1951

Note

In the interest of brevity the Petitioner cites the following authorities in support of the matters set forth in the Petition.

"RULE 52. Harmless Error and Plain Error

* * * * * * *

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

Federal Rules of Criminal Procedure

"And though the failure so to charge was not excepted to, we would not be precluded from entertaining the objection. The erroneous charge was on a vital phase of the case and affected the substantial rights of the defendants. We have the power to notice a 'plain error' though it is not assigned or specified."

United Brotherhood v. United States, 330 U. S. 395, 91 L. Ed. 973, 987.

"When there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised as not to mislead, and especially that it

should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him; deductions and theories not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice. 'Burke v. Maxwell, 81 Pa. 139, 153. See also 2 Thomp. Trials, pp 2293, 2294, and cases cited."

Starr v. United States, 153 U. S. 614, 14 S. Ct. 919, 38 L. Ed. 841, p. 845.

Followed in: Hickory v. United States, 160 U. S. 408, 13 S. Ct. 327, 40 L. Ed. 474, p. 475.

In a splendid article entitled The Timing of the Charge to the Jury By Judge Richard Hartshorne, of Newark, New Jersey, there are mentioned in Volume 33, No. 3, October, 1949 — JOURNAL OF THE AMERICAN JUDICATURE SOCIETY, principles of law which should be used as a model for all judges of trial courts.

"In short, then the main purpose of the charge to the jury is to clarify for them the real issues of fact involved and the principles of law applicable thereto. That the jury may not be diverted therefrom by the partisan contentions of astute counsel, nor, through counsel's contentious attitudes, become themselves contentions and partisan, it would seem clear that, after having been the object of these partisan contentions on summation, they should be restored to a truly unemotional, unbiased and judicial state of mind by the *calm, clear, common-sense charge of an impartial judge* before they themselves retire, as judges, to do justice between the parties." (Italics ours).

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 482

VALENTINE BROADWAY BOWERS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 334-337) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1949 (R. 337). The petition for a writ of certiorari was filed on December 14, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the trial court's supplemental charge to the jury, after they had first reported inability to agree on a verdict and later returned with questions as to what constitutes a contract, was prejudicially erroneous as being argumentative and one-sided.

STATUTE INVOLVED

Section 215 of the Criminal Code, 18 U.S.C. [1946 ed.] 338, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be

fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner was indicted in seven counts for using the mails to defraud, in violation of Section 215 of the Criminal Code, 18 U.S.C. [1946 ed.] 338 (R. 1-7). He was found guilty on counts 4, 5 and 7 and the jury was unable to agree on a verdict on the remaining counts (R. 10). After verdict, his motion in arrest of judgment as to count 7 was sustained on the ground that the statute of limitations had run against the offense charged therein (R. 10, 15). He was sentenced to five years' imprisonment on each of counts 4 and 5, to run concurrently (R. 14). The Court of Appeals affirmed the conviction (R. 337.)

The evidence as to counts 4 and 5, summarized below, illustrates both the nature of the scheme to defraud and the means used by petitioner in its execution:

After answering petitioner's advertisement in the Cleveland *Plain Dealer* for an associate manager in an automobile business in Fort Lauderdale, Florida, Jay MacLaren received a letter dated April 15, 1946, signed "Coastal Motors, Inc., by V. B. Bowers, Jr.,"[1] asking him to call in regard to the position (R. 91-92). In answer to MacLaren's phone call, petitioner arranged a meeting

[1] Petitioner's subsequent letters of May 5 (R. 95) and May 21, 1946 (R. 98-99), were signed "Coastal Motors, by V. B. Bowers, Jr."

at Jacksonville, where he informed MacLaren that he owned two service stations at Fort Lauderdale, as well as used car and rental car businesses. Petitioner proposed a $5,000 escrow deposit (later reduced to $3,000; R. 108-109) by MacLaren. (R. 93.) At Fort Lauderdale, petitioner took MacLaren for a drive, and pointed out as his properties two filling stations and a used car lot known as Island Motors. When MacLaren expressed his satisfaction with the set-up, petitioner requested a $1,000 check immediately, but MacLaren wanted to wait until his return to Cleveland and insisted upon a contract first. In Cleveland, MacLaren received a letter dated May 5 together with a contract from petitioner. (R. 94-95.) In a letter dated May 9, MacLaren forwarded to petitioner a check for $1,000 payable to Coastal Motors as the initial payment on a total of $3,000, in accordance with the terms of the signed contract enclosed with his letter. Under the terms of the one-year contract, petitioner was to pay MacLaren $75 per week for his services in the business, and at the end of the year MacLaren was to have the option of purchasing a one-half interest in the business. (R. 96-98.) In a letter dated May 21, petitioner requested that MacLaren have copies of the contract made on legal size stationery, sign the original, and return it for his signature. MacLaren complied with this request in his letter of May 23. (R. 98-100.) MacLaren received no reply until petitioner's letter of June 6, stating that his contem-

plated trip North had been delayed and that he would bring the contract when he arrived to talk to MacLaren. Meanwhile, MacLaren had given up his job and sold his furniture, and he became desperate when petitioner did not come to see him. (R. 100-102.) After sending an urgent letter dated July 22, 1946, MacLaren received a phone call from petitioner telling him to come to Fort Lauderdale (R. 102). Upon his arrival, MacLaren found that there were no longer two service stations as specified in the original agreement, but only a used car lot with separate telephones for Coastal Motors and Island Motors. Petitioner told MacLaren that he was also distributing motor scooters as part of the business of Coastal Motors. (R. 105.) After resisting petitioner's efforts to obtain the additional $2,000 from him, MacLaren learned from Darwin York that they had both answered the same ad, had talked to petitioner in Jacksonville on the same day, and had similar contracts for a one-half interest in the business. MacLaren then insisted upon the return of his $1,000, which petitioner gave him together with $75 for one week's salary. (R. 106-107, 114-115.)

York also responded to an advertisement in the Cleveland *Plain Dealer* and later went from Warren, Ohio, to Jacksonville to discuss petitioner's proposition. Petitioner informed York that he would share in the profits from several businesses, including used cars, used parts, the Pompano Taxi Company, and two gasoline stations. (R. 119-120.)

After petitioner showed York his purported business properties in Fort Lauderdale (R. 120-121), York decided that he wanted a 50 per cent interest in the business for which he was to pay $5,000 (R. 122). After York returned to his home, petitioner mailed him a letter dated May 21, 1946, enclosing a copy of the contract and asking him to have it typed on legal size paper and mail it to petitioner (R. 123-124). In a letter of June 6, petitioner informed York he had changed his plans in regard to keeping the gasoline stations and said he would arrange to meet York in Cleveland. He did not do so. (R. 127-128.) On July 16, after selling his home, York went to Fort Lauderdale. He turned over to petitioner a total of $5,800, $300 of which was for rent for a home petitioner obtained for him (R. 125-126) and $5,500 of which petitioner used to pay W. G. Ford for Island Motors (R. 137). York did not recover any of the funds he gave petitioner, nor was he paid any salary (R. 130). Later petitioner gave York a non-negotiable note for $5,500 which York reduced to judgment but was unable to collect (R. 131-132). In other essentially similar transactions, petitioner obtained substantial amounts from six other victims (see R. 336).

The other facts relating to the question presented are set out in the Argument.

ARGUMENT

In his main charge to the jury, the trial judge gave the usual instructions on the presumption of

innocence, the burden of proof, and the "duty and obligation" of the jury as the "sole triers of the fact." In this connection, he admonished that "Any comments which I may make upon the evidence are expressions of my own opinion, and are only made in the effort to assist you in arriving at a true verdict." (R. 298-299.) He then read the pertinent part of the statute, summarized the allegations of the indictment, and explained the elements of the offense (R. 299-302). He observed that there seemed to be "little doubt that in each instance, the mails were used in connection with the plan which the defendant had" and that it therefore seemed to him "that there is only one issue for you to determine, and that is the issue of whether or not this defendant had devised a plan or scheme to defraud" (R. 302-303). He emphasized that intent to defraud was an essential element of the offense and explained that in determining whether petitioner had such intent the jury must consider what he said and did and "all the circumstances attending these various transactions" (R. 304). The jury were also instructed, however, that evidence concerning petitioner's transactions with government witnesses Clark and Laki, who were not named as victims in the indictment (see R. 1), and evidence that he had previously been convicted of mail fraud [2] could be considered only on the issue of intent (R. 303, 304). In addition, the

[2] This fact was brought out on cross-examination of petitioner, without objection (R. 277).

jury were told that they should consider on the issue of intent the evidence that petitioner made refunds to some of the witnesses, but that his actions in this regard would not exculpate him if he had in fact devised a scheme to defraud and used the mails in its execution (R. 303-304). Finally, the judge adverted to petitioner's defense that "his plans were honest, business transactions" and told the jury that if they believed him they should find him not guilty (R. 305). Beyond these references to the evidence, the judge did not, as he himself observed at the conclusion of his charge (*ibid.*), undertake a comprehensive review of the trial.

After the jury had deliberated awhile, they reported that they were unable to agree on a verdict on any of the counts, but they desired no further instructions.[3] The trial judge, as was proper (see *Allen* v. *United States,* 164 U.S. 492, 501), and without objection, urged them to try again to reach a verdict on one or more counts. (R. 306-309.)

The incident of which petitioner complains occurred later, when the jury returned to ask whether "a letter quoting terms as a contract would be considered a contract" (R. 309-310). After some colloquy between the judge and the jury as to the elements of a contract (R. 310-312), the judge

[3] It does not appear how long the jury had deliberated before they reported disagreement or how much time elapsed before they again returned to the courtroom for further instructions, as related in the text. The record shows, however, that the testimony was concluded at 11:10 a.m. and the verdict returned at 7:15 p.m. (R. 297, 317).

gave a supplemental instruction obviously calculated to clarify their thinking and focus their attention on the only issue developed by the evidence—the issue of petitioner's intent. He first adverted to petitioner's testimony that "these were legitimate transactions and legitimately entered into, open and above board," and said that if the jury believed petitioner, or if his testimony left a reasonable doubt in their minds, they should acquit him. (R. 312.)[4] He reiterated at the close of this instruction that the real issue was whether petitioner's "representations to these people were honest. And if they were, even if they were rosy, that is one thing, and it is quite another thing if it was his purpose to defraud these people" (R. 314). The judge also commented briefly on the evidence adduced by the Government, pointing out that over a period of approximately two years, petitioner "took in as partners or associates, or whatever you might call them," the six people named in the indictment and three others, that all of these people "put up money," that some of them got back all or part of their "cash investment," while others received nothing, and that none of them received any profit or was "made whole, if you count their time and expenses and quitting their jobs,

[4] The only witness for the defense, in addition to petitioner, was one Hertel, who testified that he had heard government witness Laki tell petitioner in the corridor of the courthouse, before Laki took the stand, that he would leave the courthouse if petitioner would give him back his money, and that petitioner replied that Laki would not "get a cent" (R. 206-208).

and selling their homes and moving down here." The jury were told that they should "consider those things" and the fact that "nearly all of these transactions followed the same pattern." The judge also referred to petitioner's prior conviction and repeated that the jury could consider this fact as bearing on his credibility and "what his motives and intentions were in these transactions."[5] (R. 313.) Finally, after telling the jury, in response to a question, that each count was "separate" and that it was within their province to convict or acquit on all or some of the counts, the judge repeated in substance his earlier instruction respecting the evidence of petitioner's repayments to some of the government witnesses (R. 314). Although defense counsel excepted to some parts of this supplemental charge, there was no objection, as there is now, that it was "argumentative and one-sided" (Pet. 16).

It is settled, of course, that a federal trial judge may draw attention to and comment on the evidence which he deems important, and even express his opinion on the facts, so long as he does not by command or other coercion infringe upon the jury's province to determine them. See *Simmons* v. *United States,* 142 U.S. 148, 155; *Horning* v. *District of Columbia,* 254 U.S. 135, 138, 139; *Quercia* v. *United States,* 289 U.S. 466, 469; *United States* v. *Murdock,* 290 U.S. 389, 394; *United States* v. *Goldstein,* 120

[5] This instruction was a correct statement of the law. *King* v. *United States,* 144 F. 2d 729, 732-733 (C.A. 8), certiorari denied, 324 U.S. 854; *Weiss* v. *United States,* 122 F. 2d 675, 687 (C.A. 5), certiorari denied, 314 U.S. 687.

F. 2d 485, 491 (C.A. 2), affirmed, 316 U.S. 114. There was no such infringement here. The trial judge's review and comments on the evidence appear appropriate in the particular circumstances of this case. As we have shown, he expressly refrained from reviewing the evidence in his main charge. But when the jury returned the second time to ask for instructions on the law of contracts, it became apparent to him, as it is to us from a reading of the record, that they were being delayed in reaching a verdict by consideration of irrelevant matters.[6] Accordingly, he undertook to define again for them the crucial issue of petitioner's intent and to focus their attention on the significant items of evidence they should consider in resolving that question. In doing so, he summarized briefly the evidence on both sides. While his summary of the Government's evidence was longer than his statement of petitioner's defense, this can be explained by the nature and extent of the proof adduced to show fraudulent intent. The judge was not required to mention all the items of evidence, either for the prosecution or the defense, especially since he had cautioned the jury in his main charge that his comments on the evidence were only intended to assist them, that they were the sole triers

[6] Toward the end of his supplemental instructions, the judge adverted to the jury's questions about contract law and properly charged them that "legal questions about a contract [have no] great bearing in this case. A question of not whether or not the man entered into a legal contract—it may be that it was a legal contract; maybe it was dated as of a certain date—the question is, his motive." (R. 313-314.)

of the facts, and that they were to consider all the circumstances in determining petitioner's intent. *Allis* v. *United States,* 155 U.S. 117, 123-124.

Nor was the supplemental charge argumentative. As the judge pointed out, the evidence concerning petitioner's dealings with the government witnesses was largely uncontradicted. And this review of the evidence does not appear to be "one-sided." The judge's references to the similarity of the transactions with the various government witnesses, and to the fact that they derived no profits from their partnerships with petitioner, do not involve error. A trial judge may fairly point out to the jury the rational implications of the evidence (*United States* v. *Frankel,* 65 F. 2d 285, 288 (C.A. 2), certiorari denied, 290 U.S. 682), especially where, as here, intent is the crucial issue.

CONCLUSION

The judgment below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Acting Assistant Attorney General.
ROBERT S. ERDAHL,
ROBERT G. MAYSACK,
Attorneys.

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